NOTE

This Microfiche meets the quality requirements of the American National Standard for Microfiche of Documents (ANSI PH5.9-1975). However, because of imperfections in the document from which it was made, it contains images that are illegible or difficult to read. The source document for this microfiche is the best copy that could be obtained prior to filming.

CIS Congressional Information Service, Inc
Washington D.C.

Calendar No. 685

101ST CONGRESS
2d Session

SENATE

REPORT
101-364

CONSENTING TO CERTAIN AMENDMENTS ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII TO THE HAWAIIAN HOMES COMMISSION ACT, 1920

JULY 12 (legislative day, JULY 10), 1990.—Ordered to be printed

Mr. JOHNSTON, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany S. J. Res. 154]

The Committee on Energy and Natural Resources, to which was referred the joint resolution (S.J. Res. 154), to consent to certain amendments enacted by the legislature of the State of Hawaii to the Hawaiian Homes Commission Act, 1920, having considered the same, reports favorably thereon with amendments and recommends that the joint resolution, as amended, do pass.

The amendments are as follows:

On page 1, line 9, strike "Act 75,"; and, after "Act 84," insert "Act 85,".

PURPOSE

The purpose of S.J. Res. 154 is to provide Congressional consent to six amendments to the Hawaiian Home Commission Act of 1920 which were enacted by the State of Hawaii during 1986 and 1987.

BACKGROUND

The Hawaiian Homes Commission Act (HHCA) was enacted by the United States Congress in 1921 as a homesteading program to place native Hawaiians—defined as those of 50 percent or more Hawaiian blood—on land in Hawaii designated for that purpose. Approximately 200,000 acres were defined as "available lands" under the Act. The Hawaiian Statehood Act in 1959 (Public Law 86-3, 73 Stat. 4) conveyed title to the "available lands" to the new

S313-34

State, and it generally placed responsibility for the administration of the Hawaiian Homes Commission Act in the State.

Section 4 of the Statehood Act provides that the HHCA is to be included in the Constitution of the new State as a "compact" with the United States, and that, with certain exceptions, the HHCA can be amended by the State "only with the consent of the United States". The exceptions are amendments relating to administration and to the powers and duties of certain State officers. Section 4 contains other restrictions as well: the qualifications of lessees cannot be changed, certain encumbrances on Hawaiian Home Lands cannot be increased, and the benefits to lessees cannot be diminished without United States consent. There is also an absolute bar to the impairment or reduction of certain named funds and to the use of income from "available lands" for any purpose other than as specified under Section 5(f) of the Statehood Act.

The program itself has a history of controversy. In 1983, a State-Federal Task Force completed a review of the program to determine whether it was meeting its purposes. The Task Force documented many deficiencies including: a lack of accountability for the lands, improper use of lands by ineligible persons and by the state, poor financial investments, and long waiting lists for leases. The Task Force also identified confusion regarding the rights and responsibilities of the Federal government, state government and the program beneficiaries. The Task Force made numerous recommendations which have been the focus of efforts to improve program performance.

In addition, court judgements (particularly *Keaukaha-Panaewa Community Assoc.* v. *Hawaiian Homes Commission*, 588 F.2d 1216 (1978)), have found that "the state is the trustee" under the program, and that "The United States has only a somewhat tangential supervisory role * * *". The courts have also defined the limited extent of the beneficiaries right to sue for breach of trust. Given the limited supervisory role of the United States, it is important that any proposed changes be carefully reviewed.

S.J. Res. 154 would provide the "consent of the United States", as Section 4 requires, to those amendments enacted by the Legislature of Hawaii in 1986 and 1987. Public Law 99-557, of October, 1986, provided the consent of the United States to amendments made by the State up through 1985, with the exception of Act 112 of 1981. There are six amendments covered by this resolution (a summary of the six Acts appears in the Executive Communications section of this report) and only two, Act 75 and Act 84 of 1986, appear to clearly require Section 4 consent. However, consent is sought for the other amendments to avoid judicial challenges that might be made if consent was not obtained. All six Acts were passed by both houses of the Hawaii legislature without a dissenting vote, and in the view of the Department of the Interior each is "free of controversy".

LEGISLATIVE HISTORY

S.J. Res. 154 was introduced by Senator Johnston, by request of the Administration, on June 8, 1989 and it was referred to the Committee on Energy and Natural Resources. A companion meas-

ure, H.J. Res. 444, was introduced in the House of Representatives on November 20, 1989. The Committee held a hearing on S.J Res. 154 on March 8, 1990 and on June 20, 1990 unanimously ordered the measure reported with amendments.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTES

The Senate Committee on Energy and Natural Resources, in open business session on June 20, 1990, by unanimous vote of a quorum present, recommended that the Senate pass S.J. Res. 154, if amended, as described herein.

YEAS	NAYS
Mr. Johnston	—
Mr. Bumpers	
Mr. Ford	
Mr. Bradley [1]	
Mr. Bingaman [1]	
Mr. Wirth	
Mr. Conrad [1]	
Mr. Heflin [1]	
Mr. Rockefeller [1]	
Mr. Akaka	
Mr. McClure	
Mr. Hatfield [1]	
Mr. Domenici	
Mr. Wallop [1]	
Mr. Murkowski	
Mr. Nickles	
Mr. Burns	
Mr. Garn [1]	
Mr. McConnell	

[1] Indicates voted by proxy.

COMMITTEE AMENDMENTS

The Committee amendments would make two changes to the resolution. First, they would strike Act 75, and consequently would deny United States consent to the amendments to the HHCA enacted by Act 75. Second, they would make a technical change adding Act 85 to the resolution, as it was inadvertently dropped from the resolution during printing.

The Committee has withheld consent to Act 75 because the Act has deficiencies that could result in the effective alienation of Hawaiian Home Lands. Under existing law, Native Hawaiians may obtain 99-year leases at a cost of $1 per year. However such leaseholders cannot pledge their leasehold interest to secure private financing except for loans insured or guaranteed by a federal agency. Thus, private lenders may unable to place a mortgage lien on homestead properties. This situation has limited the opportunity to develop Hawaiian Home Lands.

Act 75 would provide an alternative method, the "Homestead General Lease Program", under which Native Hawaiians may lease Hawaiian Home Lands. The Department of Hawaiian Home Lands would be authorized to subdivide and improve any available

lands for leasing and to enter into agreements with developers for the construction of improvements. These improved lots may then be leased at "fair market rent" and these "general" leasees may, under Section 503(f), sell, transfer, or encumber their leasehold interests with private sector mortgage loans with the approval of the Department of Hawaiian Home Lands. Native Hawaiians would receive priority for such leases, followed by other Native Hawaiians. If all qualified and interested Native Hawaiians have received leases, then remaining lots may be disposed of at fair market rental to the general public.

Non-natives may also acquire these general leases, under Section 508, after a sale upon foreclosure of a mortgage. Act 75 provides for the termination of this General Lease Program after 5 years.

Act 75 does not appear to have any legal bar on the extent of leasing of Hawaiian Home Lands to non-native Hawaiians under this General Lease Program, nor does it specifically limit the encumbrances that may be placed on such General Leases. One area of particular concern is that Act 75 does not limit the Department's authority to grant favorable lease terms to a leasee that could, in effect, alienate lands from the trust. The Department could, for example, grant a lease which would require that the appraised value of a leaseholders interest in a lease be "bought out" in order to recover control of the leased lands. Because such a value could become inflated beyond the financial resources of the Department to "buy out", the lease would effectively last in perpetuity.

The Committee expressed similar, but more narrowly focused, concerns regarding Act 84. This Act would require that the Commission pay the "proportionate value" of a general leaseholders interest in a lease in order to terminate the lease before its term had expired. The Committee has requested that the State of Hawaii clarify that "proportionate value" is not intended to be the market value of the lease, but is instead a value, such as the depreciated value, which would decrease with time and would not, as a practical matter, prevent the Commission from regaining control of leased lands.

The Committee did not strike Act 84 from S.J. Res. 154, and thus the measure would provide United States' consent to the Act. However, the Committee retains the option of deleting Act 84 during floor consideration of this resolution following receipt of the requested letter of clarification from the State of Hawaii.

COST AND BUDGETARY CONSIDERATIONS

The Congressional Budget Office estimate of the costs of this measure has been requested but was not received at the time the report was filed. When the report is available, the Chairman will request it to be printed in the Congressional Record for the advice of the Senate.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following eval-

uation of the regulatory impact which would be incurred in carrying out S.J. Res. 154.

The measure would not impose any additional Government-established standards or significant economic responsibilities on private individuals. Little, if any, additional personal information would be collected as a result of enactment of this measure. Therefore, there would be no impact on personal privacy.

No additional paperwork would be required from the enactment of S.J. Res. 154.

EXECUTIVE COMMUNICATIONS

Following is a copy of the Administration's executive communication requesting the introduction of legislation which became S.J. Res. 154:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, May 31, 1989.

Hon. J. DANFORTH QUAYLE,
President of the Senate, Washington, DC.

DEAR MR. PRESIDENT: Enclosed herewith is a proposed joint resolution "To consent to certain amendments enacted by the legislature of the State of Hawaii to the Hawaiian Homes Commission Act, 1920."

We recommend that the proposed joint resolution be referred to the appropriate committee for consideration and that it be enacted.

The Hawaiian Homes Commission Act was enacted by the United States Congress in 1921 as a homesteading program, to place native Hawaiians—defined as those of 50 percent or more Hawaiian blood—on land in Hawaii designated for that purpose. Approximately 200,000 acres were defined as "available lands" under the Act. Because at that time the Department of the Interior had general responsibility for many of the territories of the United States, including Hawaii, the Secretary was given certain statutory responsibilities in the Act. One of these Secretarial responsibilities, pertaining to land exchanges, remains in the Act today, and for that reason the Department of the Interior has agreed to serve as the Federal agency generally responsible for Federal matters touching the Homes Commission Act.

The Hawaiian Statehood Act (Statehood Act) in 1959 (Public Law 86-3, 73 Stat. 4) conveyed title to the "available lands" to the new State, and it generally placed responsibility for the administration of the Hawaiian Homes Commission Act (Homes Commission Act) in the State. The Statehood Act, however, also contained additional particular provisions concerning the Homes Commission Act, and it is these that give rise to the enclosed proposed joint resolution. Section 4 of the Statehood Act provides that the Homes Commission Act is to be included in the Constitution of the new State as a "compact" with the United States, and that (with certain exceptions) the Homes Commission Act can be amended by the State "only with the consent of the United States." The exceptions are amendments relating to administration and to the powers and duties of certain State officers. Section 4 contains other restrictions as well: the qualifications of lessees cannot be changed, certain en-

cumbrances on Homes Commission Act land cannot be increased, and the benefits to lessees cannot be diminished without United States consent; and there is an absolute bar to the impairment or reduction of certain named funds and to the use of income from "available lands" for any purpose other than carrying out the Homes Commission Act.

The enclosed proposed joint resolution is intended to provide "the consent of the United States," as section 4 requires, to amendments enacted by the Legislature of the State of Hawaii in 1986 and 1987. Public Law 99-557, approved October 17, 1986, provided the consent of the United States to all but one of the amendments enacted in Hawaii from statehood through June 30, 1985. The 1986-87 amendments are six in number, and an attachment to this letter summarizes the content of each. Only one of the six, Act 75 of 1986, falls indisputably within the section 4 consent requirement (because it permits new encumbrances on leaseholds), but there is a potential for argument as to the need for United States consent with respect to the other five. It is often difficult to be certain, given the language of section 4 of the Statehood Act, whether a particular amendment requires United States consent. Very often, for example, it can be argued that a particular change could result in at least a minor diminution of benefits to some native Hawaiians. In these circumstances, it has been our position that, if there is doubt, it should be overcome by seeking consent. Through that means, litigation on the matter can be avoided.

For your information, Act 112 of 1981, the single Hawaii enactment excluded from the consent granted by Public Law 99-557, has been repealed by Act 36 of 1987. Therefore, any uncertainty that may have existed has now been eliminated. Also, one other amendment to the Homes Commission Act enacted in Hawaii in 1987, Act 283, has not been included in the proposed joint resolution because it contains nothing of substance. Act 283 is a housekeeping bill, containing corrections of typographical and other nonsubstantive errors in many Hawaii laws, and it corrects one internal reference in the Homes Commission Act. We believe it is inarguably exempt from the consent requirement.

The Hawaii Legislature enacted no amendments to the Homes Commission Act in its 1988 regular session.

The six acts cited in the proposed joint resolution were all passed by both houses of the Hawaii Legislature without a dissenting vote. We have examined all of them, together with documents pertinent to their legislative history, and we believe each to be free of controversy. When the proposed joint resolution is referred to the appropriate committee, we will transmit to the chairman of that committee copies of all six acts of the Hawaii Legislature, together with copies of testimony delivered at State hearings, State legislative committee reports, and other documents pertinent to the history of each bill as it moved through the State Legislature.

We believe it may no longer be appropriate to require the consent of the United States for amendments by the State of Hawaii to the Homes Commission Act. Accordingly, we will submit separate draft legislation to repeal this requirement as soon as possible. Before such a repeal could become effective, it could require the approval of the people of Hawaii.

The Office of Management and Budget has advised that there is no objection to the submission of this proposed legislation from the standpoint of the Administration's program.

Sincerely,

RALPH W. TARR,
Solicitor.

Enclosure.

JOINT RESOLUTION To consent to certain amendments enacted by the legislature of the State of Hawaii to the Hawaiian Homes Commission Act, 1920

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That, as required by section 4 of the Act entitled "An Act to provide for the admission of the State of Hawaii into the Union," approved March 18, 1959 (73 Stat. 4), the United States hereby consents to the following amendments to the Hawaiian Homes Commission Act, 1920, as amended, adopted by the State of Hawaii in the manner required for State legislation: Act 16, Act 75, Act 84, Act 85, and Act 249 of the Session Laws of Hawaii, 1986; and Act 36 of the Session Laws of Hawaii, 1987.

AMENDMENTS TO THE HAWAIIAN HOMES COMMISSION ACT, 1920, ENACTED IN HAWAII IN 1986 AND 1987, TO WHICH THE PROPOSED JOINT RESOLUTION WOULD PROVIDE THE CONSENT OF THE UNITED STATES

Act 16 of 1986: Authorizes the Department of Hawaiian Home Lands (the State agency which administers the Hawaiian home lands program) to participate in any Federal or State program that permits the establishment of enterprise zones on Hawaiian home lands. The principal purpose of such enterprise zones would be to encourage the employment of economically disadvantaged Native Hawaiians.

Act 75 of 1986: Provides an alternative means by which Hawaiian home lands may be made available to Native Hawaiians. Under existing law, Native Hawaiians may obtain 99-year leases at $1 per year, but they cannot pledge their leasehold interest to secure private financing except for loans insured or guaranteed by a Federal agency. Private lenders are thus unable to place a mortgage lien on homestead properties. Act 75 provides an alternative method, termed a Homestead General Lease Program, under which Native Hawaiians may lease Hawaiian home lands for residential, agricultural, pastoral, or aquacultural purposes. The Department of Hawaiian Home Lands (Department) is authorized to subdivide and improve any Hawaiian home lands for the foregoing purposes and can also enter into agreements with developers for the development and construction of improvements. The resulting lots or parcels may be leased for an initial term of not more than fifty-five (55) years at fair market value.

Native Hawaiians on the Department's waiting lists would receive priority for such leases, followed by other Native Hawaiians. If lots of parcels are available after all interested and qualified Native Hawaiians have received leases, the remaining lots may be disposed of at fair market rental to the general public. Homestead general lessees may encumber their leasehold interests by mortgage loans from the private sector, and may transfer their interests by subletting, bequests, or otherwise. The Department of Hawaiian Home Lands is further authorized to convert any homestead lease to a homestead general lease in accordance with procedures to be adopted by the Department. Act 75 provides for its repeal, and thus for the termination of the Homestead General Lease Program, either five years after the United States has consented to the Act, or on December 31, 1995, whichever occurs first.

Act 84 of 1986: Authorizes the Department of Hawaiian Home Lands to enter into agreements with private developers for the development of Hawaiian home lands for either homestead purposes or for income generating purposes. The Department of Hawaiian Home Lands is authorized under existing law to enter into such agreements; it also has authority to enter into general leases in order to derive income for use in meeting the administrative costs of the Department. Act 84 would largely perpetuate existing law, but it would exempt the Department from the requirement that its private development agreements be approved by both the legislature and the Governor. That requirement is time-consuming. It can lead to uncertainty and it may preclude the timely response to opportunities. Act 84 would also permit the Department of Hawaiian Home Lands to negotiate contract provisions conferring particular benefits upon Native Hawaiians.

Act 85 of 1986: Expands the authority of the Department of Hawaiian Home Lands with respect to the financing of improvements on homestead lands and for infrastructure development. Many lessees have been unable to construct homes on their leaseholds due to the lack of loan financing. The lack of funds has also hampered the Department's ability to construct needed infrastructure in homestead subdivisions. Act 85 is intended to meet this problem in two ways. First, it permits the Department to obtain loans by using its loan accounts receivables (e.g., money owed by its present borrowers), as collateral for loans from financial institutions. The money borrowed would be used by the Department for making loans to homestead lessees for home construction, and for the construction of infrastructure in homestead subdivisions. Second, Act 85 enables the Department to fulfill conditions under which homestead lessees can participate in the United States Department of Housing and Urban Development (HUD) insured loan program. Terms of the agreement developed by the Department and HUD require that a cash reserve be established to cover any potential defaults on the part of the mortga-

gee, and allows the transfer to that reserve of available funds from certain of the Department's other loan funds.

Act 249 of 1986: Reduces from fifteen to seven the number of fiscal accounts that the Department of Hawaiian Home Lands is required by law to maintain. As a result of amendments enacted following Statehood, the Hawaiian Homes Commission Act required the maintenance of seven separate revolving funds and eight other special funds. Act 249 abolishes some such funds and merges others in order to simplify the funding structure. This action promotes more efficient and economical management.

Act 36 of 1987: Repeals Act 112 of 1981, which was excluded from the consent provide by Public Law 99-557 because it was in conflict with an amendment later enacted in Hawaii. Act 112 had provided a new method of calculating the amount due in the event of surrender or cancellation of a lease, or the death of a lessee who had no qualified heir. The effect of Act 36 is to continue substantially the earlier method of calculating the amount due, which requires payment by the Department of Hawaiian Home Lands of the appraised value of improvements, including growing crops, on the leasehold. Act 36 also permits payment to be made by the Department from the General Loan Fund if the Home Loan Fund is inadequate for that purpose.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the committee notes that no changes in existing law are made by the joint resolution, S.J. Res. 154, as reported.

○